STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Elizabeth L. Gleicher, P.J., and David H. Sawyer and William B. Murphy, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

MOHAMMAD MASROOR
Defendant-Appellee. **No. 152946-8**

L.C. No. 14-000869; 14-000858; 14-000857
COA No. 322280, 322281, 322283

and

Appeal from the Court of Appeals
Kuris T. Wilder, P.J., and Donald S. Owens and Michael J. Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

ALEXANDER JEREMY STEANHOUSE **No. 152849**
Defendant-Appellee.

L.C. No. 11-011939-FC
COA No. 318329

APPELLANT'S BRIEFS ON APPEAL

*****Oral Argument Requested*****

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Statement of the Questions

I.

When judicial fact-finding does not affect a defendant's guideline scoring range, mandatory application of the guidelines is constitutional. MCL 8.5 requires that constitutional applications of a statute be given effect after unconstitutional portions are invalidated. Must the constitutional application of the guidelines statute—mandatory minimum sentences which are not enhanced by judicially found facts—be given effect?

Defendant answers: "NO"

The People answer: "YES"

II.

Should a remand occur in these cases? That is,

1) do the sentences imposed here, as a matter of law, constitute plain error under *People v. Lockridge*, the trial judge having sentenced the defendants in excess of the top of the guidelines range, for valid reasons?

Defendant answers: "YES"

The People answer: "NO"

further,

2) Even if the issue is viewed as properly preserved, is review of departures from the guidelines range for reasonableness, which is under an abuse of discretion standard and not the same thing as review for proportionality under *People v. Milbourn*, and does a pre-*Lockridge* sentence that exceeds the guidelines and meets the more exacting standard of substantial and compelling reasons necessarily satisfy the abuse of discretion/reasonableness standard?

Defendant answers: "NO"

The People answer: "YES"

Statement of Facts

People v. Masroor

Defendant's sentence guideline range was 102-180 months. Defense counsel did not object to any particular offense variable being scored, but entered "a general objection to all of the OVs" under *Alleyne* for purposes of preservation.[1] The trial judge sentenced defendant to concurrent terms for his convictions with a minimum of 35 years.[2] The Court of Appeals has remanded for a "*Crosby* hearing," solely because of the previous decision of that court in *People v. Steanhouse* adopting proportionality review as the standard for reasonableness review of sentences, stating it disagreed with that decision but was bound by it.[3] A conflict-resolution panel was ordered by the Court of Appeals, but that order then vacated, apparently due to a miscount of some sort in the polling. The People sought leave to resolve the conflict, and on other questions as set out in the application. This Court granted leave to appeal. Further facts will be added as necessary in the argument.

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[1] 82A.

[2] See Sentence Transcript, 119A-126A.

[3] *People v. Masroor*, 313 Mich. App. 358 (2015), slip opinion, p. 1 (the West citation is not yet paginated) ("Because we are bound by this Court's recent decision in *People v Steanhouse*, ___ Mich App ___; ___ NW2d ___ (Docket No. 318329, issued October 22, 2015), pursuant to MCR 7.215(J)(1), we must remand this matter to the trial court for reconsideration of defendant's sentence at a hearing modeled on the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). Were we not obligated to follow *Steanhouse*, we would affirm defendant's sentence by applying the federal "reasonableness" standard described in *Gall v United States*, 552 US 38, 46; 128 S Ct 586; 169 L Ed 2d 445 (2007), and specifically rejected by our colleagues in *Steanhouse*").

People v. Steanhouse

Defendant Steanhouse was convicted of assault with intent to commit murder and receiving and concealing stolen property under $20,000. At sentencing, Judge Patricia Fresard scored offense variables one, two, three, four, five, and six, ruling that defendant used a knife to cut his victim (25 points), that the knife was potentially lethal (5 points), that the victim almost died of his injury (25 points), that the victim and his family likely suffered serious psychological injury (10 and 15 points, respectively), and that defendant had the premeditated intent to kill (50 points).[4] Defendant did not object at sentencing to judicial fact-finding in the scoring of the guidelines.

Defendant's 39 prior record variable points put him in a PRV level D. His 130 OV points far exceeded the 75 points necessary for the top offense-variable level, VI. Inserted into the Class A offense grid, defendant's PRV and OV scores gave him a minimum sentence range of 171 to 285 months, or a little over 14 years to almost 24 years.

Exceeding the guidelines, Judge Fresard sentenced defendant to 30 to 60 years for the assault and one to five years for the RCSP. This represented an upward departure of 75 months from top of the guidelines range. Judge Fresard justified the upward departure by saying:

> [T]he first two factors that the prosecutor mentions the horrendous, brutal assault on this young man when [it] basically appeared [from] the facts that you thought he was somehow rendered weak or incapacitated by his drug use at that time.
>
> And the action taken by you towards a person who considers you a friend does substantiate the thought that you are a person without a conscience, a person who's violent and depraved and that this is an

[4] See Sentencing Information Report; SE at 15-22.

> assault that is quite shocking even to people who have been in the courts for 20 and more years.
>
> The Court is going to sentence you accordingly to 30 to 60 years on the charge of assault with intent to commit murder and one to five concurrently on the charge of receiving stolen property between the amounts of 1,000 but less than $20,000.[5]

The Court of Appeals affirmed defendant's convictions, but remanded for a *Crosby* hearing, requiring Judge Fresard to reconsider her sentence in light of the "reasonableness standard rooted in the *Milbourn* principle of proportionality." This Court has granted leave to appeal.

[5] Sentencing Transcript, 164A-165A.

Summary of Argument

This Court has determined that the Sixth Amendment is violated where a guidelines sentence minimum-term range is increased by judicial fact-finding where use of the guidelines is mandatory. The Court thus severed MCL 769.34(2)(and (3) on a limited basis, saying, among other things, that "*Consistently with the remedy imposed by the United States Supreme Court* in *United States v. Booker* . . . we hold that a guidelines minimum sentence range *calculated in violation of Apprendi* and *Alleyne*"—which is only when it is increased by judicial fact-finding and is mandatory—"is advisory only and that sentences that depart from *that* threshold are to be reviewed by appellate courts for reasonableness" (emphasis added). Moreover, even if this Court had not limited its severance remedy in *Lockridge*, the Court did not consider MCL 8.5, which requires that constitutional applications of a statute found to have unconstitutional applications remain viable, unless the legislature has made a contrary intent manifest. It has not here. Thus, MCL 769.34 in its entirely remains applicable where a guidelines range is not increased by judicial fact-finding.

Further, where a pre-*Lockridge* sentence is not within the guidelines range as scored, but a departure above it, and the issue is unpreserved, this Court held that as a matter of law plain error cannot be shown. That is the situation in both these cases, where remands have occurred though plain error was not found. And where reasonableness *is* the test in review of a sentence departure, the *Steanhouse* court erred in equating that review with the former proportionality review under *People v. Milbourn*, see infra. Rather, *Marsoor* is correct that the federal approach should be followed. Review should be for abuse of discretion; that is, whether any reasonable sentencing court would have imposed the same sentence for the reasons given.

Argument

I.
(Defendant Masroor)

When judicial factfinding does not affect a defendant's guideline scoring range, mandatory application of the guidelines is constitutional. MCL 8.5 requires that constitutional applications of a statute be given effect after unconstitutional portions are invalidated. The constitutional application of the guidelines statute—mandatory minimum sentences which are not enhanced by judicially found facts—must be given effect.

> "***When*** *a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness.*"[6]

Introduction

This Court has granted leave, directing the parties to brief specified issues:

> (1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5;
>
> (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how stare decisis should affect this Court's analysis;
>
> (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in

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[6] *People v. Lockridge*, 498 Mich. 358, 391 (2015) (emphasis supplied).
In *Steanhouse* defendant's range was increased by the scoring of guidelines through judicial fact-finding, and so the issue here applies to defendant Masroor alone.

People v Lockridge where the trial court exceeded the defendant's guidelines range; and,

(4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*.

It is critical here, then, both to ascertain that which this Court actually held in *Lockridge*, as well as the manner in which MCL § 8.5 applies. Though announcing a severance, which the People believe, as will be explained, is limited both in the opinion itself as well as necessarily by application of MCL § 8.5, this Court in its opinion never mentioned the statute. But the statute *must* be applied when severance of applications of a statute or of a portion of a statute is involved.

It should be borne in mind that the question is only of any import when a sentencing judge *decides to depart* above or below the guidelines. For the mass of sentences—guidelines sentences—it means nothing. If the People are correct, judges departing above or below the guidelines must justify why the sentence is reasonable where the guidelines were increased by judicial fact-finding, and must justify the sentence by pointing to substantial and compelling reasons where the guidelines were not increased by judicial fact-finding, the former sentence being reviewed for reasonableness, and the latter being reviewed as to the appropriateness of the substantial and compelling reasons cited.

Discussion

A. *The Lockridge holding that some applications of the guidelines violate the constitution*: this Court in *Lockridge* found that only certain applications of the guidelines violate the 6th Amendment; that is, the guidelines are unconstitutional only to "the extent to which [they] require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne*"[7]

This Court did not in *Lockridge* hold that judicial fact-finding in sentencing is unconstitutional—in fact, it required the judicial fact-finding in scoring the guidelines continue[8]—and *Alleyne*[9] itself disclaimed any such holding. Rather, it is only when a mandatory minimum sentence—and this Court found the minimum range of the guidelines calculated under the Michigan statutory scheme to constitute a "mandatory minimum" under *Alleyne*—is 1)

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[7] *People v. Lockridge*, 498 Mich. 358, 364 (2015 (emphasis supplied). In discussing the "constitutional error" identified by this Court in *Lockridge*, the People do not here concede that there *is* in fact a constitutional defect in the Michigan guidelines.

[8] *People v. Lockridge*, 498 Mich. at 392, n.28: "Our holding today does nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not" (emphasis in the original).

Defendant in his answer to the People's application argued that a resentencing should occur because under *Lockridge* he would then "have the benefit of a sentencing hearing conducted without judicial fact finding." Defendant's answer, at 2. The sort of resentencing defendant anticipates is, as noted above, in fact barred by *Lockridge*, as points must continue to be scored *with* judicial fact-finding. Indeed, defendants would likely *benefit* by a result in favor of the People's position here, which requires justification of a trial judge's departure by the more onerous standard of substantial and compelling reasons where the guidelines were not increased by judicial fact-finding, rather than under a review standard of "reasonableness." The People seek the result sought here not because it is advantageous to the People—it would only be so in cases where the guidelines were not increased by judicial fact-finding and the judge departed *below* the guidelines in the absence of substantial and compelling reasons to do so—but because the People believe it compelled by MCL 8.5.

[9] *Alleyne v. United State*s, 570 U.S. –,133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

increased by judicial fact-finding, *and* 2) *mandatory*, that the Court found that the right to jury trial has been compromised. Thus this Court's holding that the constitutional deficiency of the Michigan system is "the extent to which the guidelines require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum.'" This Court's limited holding is demonstrated by its repeated use of the phrase "to the extent that" in discussing the constitutional deficiency it identified, limiting its holding to those situations where the guidelines range is *increased* by judicial fact-finding, as again, the Court concluded that under the statutory scheme the minimum range is mandatory. If, then, the minimum range is *not* increased by judicial fact-finding, the predicate for the Sixth Amendment violation disappears, and there is no constitutional error of any sort in applying the guidelines as promulgated by the legislature in that situation.

Again illustrating this point, this Court said:

> From *Apprendi* and its progeny, including *Alleyne,* we believe *the following test provides the proper inquiry* for whether a scheme of mandatory minimum sentencing violates the Sixth Amendment: Does that scheme constrain the discretion of the sentencing court by *compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone*? Michigan's sentencing guidelines do so *to the extent that* the floor of the guidelines range compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict. Stated differently*, to the extent* that OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury *verdict increase the floor of the guidelines range*, i.e. the defendant's "mandatory minimum" sentence, that procedure violates the Sixth Amendment.[10]

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[10] *People v. Lockridge*, 498 Mich. at 374.

Application of that which this Court termed the "proper inquiry"—does the Michigan guidelines scheme constrain the discretion of the sentencing court by compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone?—results in the answer: sometimes yes, and sometimes no. The mandatory nature of the guidelines scheme, then, is only unconstitutional, as this Court repeatedly said, "*to the extent that*" a minimum guidelines range is *increased* by judicial fact-finding. If a particular sentence is *not* so increased, then application of the statutory requirement that the sentence be within that range absent a statement of proper substantial and compelling reasons is perfectly constitutional.

B. *The Lockridge severance remedy*: given the necessarily limited nature of the *Lockridge* Sixth Amendment holding, this Court in *Lockridge* only severed the mandatory requirements of MCL § 769.34(2) and (3) "*to the extent that* [they] make[] the sentencing guidelines range *as scored on the basis of facts beyond those admitted by the defendant or found by the jury* beyond a reasonable doubt mandatory"[11]

Where the guidelines range is scored in a particular case with an offense variable or variables (OV) found by judicial fact-finding, and the scoring of an OV by judicial fact-finding increases the guidelines range, then under this Court's holding in *Lockridge* the statutory requirement that the sentence be within that range absent a justification for departure of substantial and compelling reasons is unconstitutional. But where there is no such increase by judicial fact-finding, either because there is no OV scored by judicial fact-finding, or because the scoring of an OV by judicial fact-finding does not increase the range, then application of the statutory requirements is not unconstitutional. See Part A, supra. Thus the specific statement by

[11] "To remedy the constitutional violation, we sever MCL 769.34(2) *to the extent that* it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *People v. Lockridge*, 498 Mich. at 364 (emphasis supplied).

the Court of the limited nature of this Court's remedy; the mandatory requirements in the statutory scheme are severed, said this Court, "to the extent that [they] make[] the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." Again, use of the phrase "to the extent that" is a limitation on this Court's remedy for the constitutional deficiency it identified, limiting that remedy to curing the deficiency identified. But for situations outside the "extent that"—namely where the minimum range is *not* increased by judicial fact-finding—the statutory scheme is constitutional and remains applicable.

Though this limited severance cures the constitutional error, and though this Court said several times that the mandatory requirements of MCL 769.34 were severed in the specific situation where their application to a sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt was unconstitutional, in another place this Court used broader language that might be taken as suggesting that its severance remedy is to be applied even to situations where no constitutional error is occasioned by use of the statutory scheme as passed by the legislature; that is, where there is no increase of the minimum range of judicial fact-finding. As the People will more fully address in part D., context resolves any apparent inconsistency.

C. *The legislative statement on the remedy of severance*: further, MCL § 8.5 *requires* that the severance remedy imposed by this Court be limited to those situations where the minimum range of the guidelines is increased by judicial fact-finding, as that statute is the legislature's directive that constitutional applications of the statutory scheme remain viable, and it has nowhere expressed a contrary intent

1. Application of MCL 8.5 to the *Lockridge* limited holding of unconstitutionality of the guidelines statutory scheme

Though the legislature has directed the manner in which severance of provisions of statutes is to occur when a portion or application of a statute or statutory scheme is held unconstitutional, neither this Court in *Lockridge* nor the Court of Appeals here made any mention of the expressed will of the legislature. MCL § 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with *the manifest intent of the legislature*, that is to say:
>
> If any portion of an act *or the application thereof* to any person or circumstances shall be found to be invalid by a court, such invalidity *shall not affect the remaining* portions or *applications* of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, *and to this end acts are declared to be severable.*[12]

It is quite plain that this Court in *Lockridge* found that certain applications of the statutory scheme in MCL § 769.34(2) and (3) are unconstitutional; that is, where they are applied to guidelines minimum ranges that are increased by judicial fact-finding. It is equally plain that where the guidelines minimum range is *not* increased by judicial fact-finding, application of MCL § 769.34(2) and (3) to the sentence process is simply not unconstitutional under *Lockridge*, as mandatory application of the entire guidelines scheme to a constitutional sentence is perforce

[12] MCL § 8.5 (emphasis supplied).

constitutional. Further, after severing the application of these provisions from those situations where this Court has determined their application is unconstitutional, the "remaining portion" of the scheme—its application to sentences where the minimum range is not increased by judicial fact-finding—is certainly "operable."[13] And so, the legislature having declared that where a statute has been found unconstitutional as to certain applications that invalidity is not to affect the remaining applications of the act which can be given effect, this Court's severance in *Lockridge* is necessary limited, as this Court said, "to the extent that" the statutory scheme applies to minimum sentence ranges that are increased by judicial fact-finding.

To be sure, this leaves a statutory scheme other than that enacted by the legislature, where the mandatory nature of the minimum range continues to apply to sentences not increased by judicial fact-finding, but not to sentences increased by judicial fact-finding, the latter being constrained only by review for "reasonableness," while the legislature intended that its statutory scheme to apply to all sentences. But this cannot avoid the legislature's directive in the severance statute. Of course, *whenever* a statutory scheme is found invalid as to some portions but not others, or, as here, some applications but not others, the statutory scheme as then applied is not that enacted by the legislature—but the legislature has directed that in this situation the scheme is to be applied where it can be given effect without the invalid application. To avoid limited severance on the ground that after severance the statutory scheme is no longer that which the legislature enacted is to render MCL § 8.5 a nullity. Here, the remaining "two-tiered" or

[13] See Merriam-Webster, inoperable: "not capable of being used"; Webster's New World College Dictionary, inoperable: "inoperative"; inoperative: "not operative; not working"; The American Heritage Dictionary of the English Language: "not functioning; inoperative." It cannot be said that the constitutional applications of MCL 769.34(2) and (3) are not capable of functioning. And again, this matters only when there is a guidelines-departure sentence.

"hybrid" system is the result of this Court's opinion in *Lockridge* and faithful application of MCL § 8.5; if the legislature is of the mind that in this situation it wishes something else, it is for the legislature to so say.

It may be argued that in *Booker*[14] itself the United States Supreme Court recognized that declaring the federal guidelines advisory across the board would void Congress's will in situations where mandatory application of the guidelines worked no constitutional wrong, yet the Court nonetheless made the guidelines advisory in all circumstances (over dissenting views). But the critical distinction is that there *is no federal severance statute*, and so the Court was free to make its "best guess" as to what Congress would have it do with the statutory scheme after the Court's declared that its application in some situations was unconstitutional.[15] This Court, to the contrary, is *not* free to take its best guess, but must faithfully apply MCL § 8.5.

It might also be said that this Court may make its best guess as to the will of the legislature because MCL § 8.5 says that its provisions do not apply where severance only of invalid applications of the statutory scheme "would be inconsistent with *the manifest*[16] *intent of the legislature*."[17] Again, this Court is not free to guess at the legislature's intent in this

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[14] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed.2d 621 (2005).

[15] See *United States v. Booker*, 125 S.Ct. at 758.

[16] "Manifest" means, in this context, "easily understood or recognized." Merriam-Webster Dictionary. Also "to show or demonstrate plainly," American Heritage Dictionary of the English Language; "to make clear or evident; show plainly; reveal; evince," Webster's New World College Dictionary.

[17] It appears that it became common for the legislature to include severance provisions in specific statutes, and eventually the legislature enacted MCL 8.5 in 1945 to express its will with regard to *all* statutes concerning severability in avoidance of these statute-specific severability clauses. See *People v. Victor*, 287 Mich. 506, 511 (1939): "We are mindful of the fact that the

regard—whether the legislature wishes *not* to have the severance statute apply—rather, that intent must be made *manifest* by the legislature, and the legislature has not done so here. And the legislature knows how to make its intent manifest when it so desires. Two examples:

- Pursuant to section 8 of article 3 of the state constitution of 1963, it is the intent of the legislature to request by concurrent resolution the opinion of the supreme court as to the constitutionality of this 1976 amendatory act as amended. Notwithstanding section 5 of chapter 1 of the Revised Statutes of 1846, being section 8.5 of the Michigan Compiled Laws, if the supreme court's advisory opinion finds any portion of this act, as amended, to be invalid, *the entire act shall be invalid.*[18]

- Enacting section 1. If any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, it *is the intent of the legislature that the provisions of this amendatory act are nonseverable* and that the *remainder of the amendatory act shall be invalid, inoperable, and without effect*.[19]

And, after all, applying the statutory scheme as written to *some* applications—where the guidelines range is not increased by judicial fact-finding—is closer to the legislative intent than applying the statutory scheme as written to *no* applications.

This Court has applied MCL 8.5 on a number of occasions to sever portions of statutes, leaving the remaining part of the statutory scheme in place. In *Coffman v. State Bd. of Examiners*

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constitutionality of an act will be presumed until the contrary is shown, and that an entire statute will not be declared unconstitutional because one part is void, if the balance of the act will be effective. *The act itself contains a severability clause so often found in recent legislative enactments*" (emphasis supplied).

[18] MCL. § 830.425 (emphasis supplied).

[19] PA 52, 2007, MCL § 168.615c (emphasis supplied) later later unconstitutional.

in Optometry[20] Coffman wished to sit for the Michigan examination in optometry. The statute, MCL § 338.253, required that an applicant have graduated from "an optometric school or college *rated as class A or class B by the international association of boards of examiners* in optometry." The Attorney General issued an opinion that this portion of the statute was unconstitutional as "an attempted delegation of legislative power to a non-governmental body," also saying that "the excision of the ultra vires phrase would not affect the validity of the remainder of the act."[21] This Court agreed with the Attorney General: "We are in accord with such opinion and hold that the legislature could not delegate to the international association of boards of examiners in optometry the rating of optometric schools or colleges as required under the act. In view of our holding the statute would read: '. . . . the applicant shall be at least 21 years of age, of good moral character, who is a graduate of an optometric school or college teaching optometry and giving a course of at least 2 years of six months each," the Court citing to MCL 8.5.[22] In other words, the Court excised from the statute that portion it found unconstitutional—that portion requiring that the applicant be a graduate from an optometric school or college "rated as class A or class B by the international association of boards of examiners in optometry"—and held that the remainder of the statute continued in force.

This is an example of a portion of a statute being held unconstitutional on its face. What of situations where the statute is unconstitutional *as applied* to some situations, meaning that it is not unconstitutional when applied in other situations, which is, under *Lockridge*, the case with

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[20] *Coffman v. State Bd. of Examiners in Optometry*, 331 Mich. 582 (1951).

[21] *Coffman v. State Bd. of Examiners in Optometry*, 331 Mich. at 588.

[22] *Coffman v. State Bd. of Examiners in Optometry*, 331 Mich. at 588.

the sentence-guidelines scheme. It seems that on many occasions severance of only the unconstitutional applications occurs almost without thought of any striking of the operation of the statute as to its constitutional applications. *Miller v. Alabama*[23] provides an example. A mandatory life sentence, under a scheme providing no possibility of parole, is, the Supreme Court held, unconstitutional as applied to juveniles, who must have an individualized sentencing that provides consideration of the "mitigating factors of youth" before a sentence of life that is not paroleable may be imposed. But the Court did not hold that mandatory life-without-parole statutory schemes are unconstitutional, but only that they may not constitutionally be applied to this class of defendant—no one thinks that mandatory life without parole for adults was struck down by *Miller*. Though no language of severance was used, a *de facto* severance occurred, and this appears often to be the case where statutes are declared unconstitutional as applied to some situations. *In re Treasure of Wayne County For Foreclosure*[24] provides an example from this Court. There this Court considered the constitutionality as applied of MCL 211.78k(6), which deprives the circuit court of jurisdiction to alter a judgment of foreclosure, vesting "*absolute title* in the foreclosing governmental unit, and if the taxpayer does not redeem the property or avail itself of the appeal process in subsection 7, then title 'shall not be stayed or held invalid . . . .'" This Court held the statute unconstitutional as applied to property owners who were denied due process in the taking of the property because of a lack of notice, so that though "[t]he act does not provide an exception for property owners who are denied due process," nonetheless "[b]ecause the Legislature cannot create a statutory regime that allows for constitutional violations with no

[23] *Miller v. Alabama*, 567 U.S. ——, 132 S.Ct. 2455, 183 L. Ed.2d 407 (2012).

[24] *In re Treasure of Wayne County For Foreclosure*, 478 Mich. 1 (2007).

recourse, that portion of the statute purporting to limit the circuit court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable *as applied* to property owners who are denied due process."[25] Where proper notice is given, on the other hand, the statutory divestment of jurisdiction "is not problematic."[26] Though MCL 8.5 was not mentioned, a *de facto* severance occurred; that is, the statutory divestment of jurisdiction continued to apply to the class of property owners given constitutionally adequate notice, while the circuit court retained jurisdiction to modify the judgment of foreclosure as to the class of property owners where constitutionally inadequate notice was given. Put in the language of MCL 8.5, an application of the statute was found to be unconstitutional, and so was stricken, but application of the statute to those circumstances where application was not unconstitutional was "not affect[ed]" by that invalidity. So here.

There are, as it were, two classes or sorts of "as applied" unconstitutional applications of statutes, one substantive and the other procedural. If a court declares that a statute that can constitutionally be applied to some conduct cannot constitutionally be applied to other conduct, the result is that the latter conduct cannot be made criminal. The statute is not somehow transformed or rewritten, certain conduct is simply excluded from its reach. For example, in *Lawrence v. Texas*[27] the Supreme Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as

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[25] *In re Treasure of Wayne County For Foreclosure*, 478 Mich. at 9-11 (all but final emphasis in original).

[26] *In re Treasure of Wayne County For Foreclosure*, 478 Mich. at 10.

[27] *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L. Ed. 2d 508 (2003).

applied to adult males who engage in consensual sodomy in the privacy of the home. But where a certain *process*, such as sentencing, must occur, and one method of proceeding is declared unconstitutional, *something* remains in place—the procedure may be altered, but the process remains. Often, that which remains is simply, as in *In re Treasurer*, the other side of the coin; that is, where the statute provided that the circuit court was deprived of jurisdiction, this Court held that as to those denied notice comporting with due process the circuit court was *not* deprived of jurisdiction. But this Court in that case did not apply the remedy of circuit court jurisdiction also to those situations where its denial was *not* unconstitutional, where constitutionally sufficient notice was given. *Booker*'s rewriting of a statute so as to apply an "advisory guidelines" remedy to situations where mandatory application of the guidelines is constitutional is unusual, and the result of federal severance jurisprudence created in the absence of any federal statute guiding the Court as to Congress's intentions in this situation. The Court is to take its best guess as to the intent of Congress, asking "'Would Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?"[28]

But Michigan has MCL 8.5. The statute takes the guesswork of legislative intent out of the question, for unless the legislature has made its intent to the contrary *manifest*, when an application of a statute to any circumstances is found to be invalid by a court, that invalidity *shall not affect the remaining portions or applications of the act* which can be given effect without the

[28] *United States v. Booker*, 125 S. Ct. at 757. Justice Stevens dissent argued that in making the guidelines advisory across the board, including situations where their mandatory application worked no constitutional wrong, "the extraordinary overbreadth of the Court's unprecedented remedy is manifest. . . . In my judgment, it is therefore clear that the Court's creative remedy is an exercise of legislative, rather than judicial, power." *United States v. Booker*, 125 S. Ct. at 772 (Stevens, J., dissenting).

invalid portion or application, provided only that the remaining applications are not determined by the court to be "inoperable"; the legislature has thus declared that "to this end acts are declared to be severable." The legislature has not made its intent manifest that severability should not apply here so as to save the constitutional applications of the guidelines as written,[29] and the guidelines as written are certainly operable with regard to those constitutional applications; namely, where the range is not increased by judicial fact-finding. MCL 8.5 governs, and requires that these constitutional applications of the guidelines continue. Of course, if the legislature determines that it desires something else, it is free to modify the statutory scheme.

2. Application of the guidelines as written in this case is constitutional

Here, 75 points were scored on the OV calculation. 50 points were scored under OV 13 for "continuing pattern of criminal behavior." The OV is to be scored where "The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age, and the sentencing offense is first-degree criminal

[29] In *People v. McMurchy*, 249 Mich. 147, 158-159 (1930) this Court quoted Justice Cooley to the effect that "if, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." *McMurchy* antedates MCL 8.5, and the test now is whether the constitutional applications are "operable." Further, here, maintaining those applications of the guidelines as written is consistent with the legislative intent to eliminate sentencing disparity, see *People v. Garza,* 469 Mich. 431, 434-435 (2003), as mandatory application of the guidelines where constitutional achieves the legislative intent at least in that class of cases, and at least to a greater extent than advisory application across the board. Some have read *McMurchy* to mean that if the Court determines that "the Legislature would not have enacted the act without the severed provisions, the Court cannot sever them." *People v. McCuller*, 475 Mich. 176, 210 (2007)(Kelly, J., dissenting). If *McMurchy* can be read that way, then it has been superceded by MCL 8.5. The Court is no longer to attempt to divine intent; rather, the legislature must make its intent regarding nonseverability *manifest.*

sexual conduct."[30] Though an "offense variable," the OV is actually more, at least in cases such as this one, a matter of counting, and is supported by the jury verdict, as the trial judge noted.[31] 15 points were scored for OV 10, "exploitation of a vulnerable victim."[32] 10 points are scored if the defendant "exploited a victim's . . . youth . . . or . . . abused his or her authority status," and the points rise to 15 if "predatory conduct was involved." For ease of analysis, it can be assumed hypothetically that the 5 additional points for predatory conduct involved judicial fact-finding, but the exploitation of the victim's extreme youth (and even the abuse of defendant's authority status as their uncle) are supported by the convictions here. The court scored 10 points under OV 4, psychological injury to victim[33]; again, for ease of analysis, it may be assumed that this scoring involved judicial fact-finding. This leaves a total of 60 points for the OVs. Defendant's range was a C-IV when scored at 75 points. A C-IV includes OV scoring of *60-79 points*. Removing the 10 points for psychological injury, and the 5 points for predatory conduct, and the defendant *remains a C-IV*. Defendant's guideline range was *not* increased by judicial fact-finding. Mandatory application of the legislature's statutory scheme in this circumstance is not unconstitutional, and under the severance statute, that scheme thus governs here.

Faithful application of MCL § 8.5 requires that severance here be limited, as this Court said in *Lockridge*, "to the extent that" application of the guidelines in a particular case would result in a minimum range increased by judicial fact-finding. Because the Court of Appeals here

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[30] MCL § 777.43(1).

[31] ST, 17-19, 52.

[32] MCL § 777.40.

[33] MCL § 777.34.

remanded, without even addressing whether the guidelines range was increased by judicial fact-finding, it erred, an error that court also made in the published opinion in *People v. Terrell*,[34] that panel expressly finding that a "*Crosby* remand" is required *even when the guidelines range is not increased by judicial fact-finding,* a form of "errorless harm." This cannot be squared with Michigan's severance statute. Where, as here, scoring of the guidelines results in no constitutional error, the guidelines scheme promulgated by the legislature governs.

D. *Stare decisis*: stare decisis would not be implicated by an affirmation that the Court's holding in *Lockridge* was that required by MCL § 8.5, and stated by the Court—that MCL § 769.34(2) and (3) are severed "to the extent that [they] make[] the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory"–which at most would be a clarification of *Lockridge*

This Court has asked "whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge* . . ., and, if so, how stare decisis should affect this Court's analysis." At most, acceptance of the People's argument would result in a clarification of this Court's declaration of remedy in *Lockridge*. In the beginning prefatory section of the opinion, before the Court's "1. FACTUAL BACKGROUND AND PROCEDURAL HISTORY," the opinion summarizes its finding of a constitutional violation—the "deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*.[35] It also states the remedy it is imposing: "To remedy the constitutional violation, we sever MCL

[34] *People v. Terrell*, 312 Mich. App. 450 (2015).

[35] *People v. Lockridge*, 498 Mich. at 364.

769.34(2) ***to the extent that*** *it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory.* We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure."[36] Thus, in its summary opening section, describing that which was to follow, the Court limited its severance to those circumstances where application of the guidelines is unconstitutional as found by the Court, so that the severance of the statute was "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." Were this Court severing the statute across the board, even as to its constitutional applications, the words of limitation "to the extent that" and the tie to the predicate of unconstitutional scoring by judicial fact-finding would not have appeared.

Further, in the concluding paragraph to the opinion's "REMEDY" section, the opinion reiterates that it is the predicate of unconstitutional sentencing that triggers the severance remedy, saying "*When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury*, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness."[37] The Court did not here say that the sentencing court may *always* "exercise

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[36] *People v. Lockridge*, 498 Mich. at 364 (emphasis supplied).

[37] *People v. Lockridge*, 498 Mich. at 391 (emphasis supplied).

its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so," with review of that departure being for reasonableness, but expressly stated the predicate—the "when"—by saying that the inapplicability of the substantial and compelling reasons requirement of the statute occurs "when a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury." If this limitation does not mean what it says, the Court surely would not have included the triggering predicate in both its preliminary statement of the holding in its opening summary, and in the *Remedy* section of the opinion.

It is true enough that the Court also made what appears to be a more general statement regarding remedy, saying "Accordingly, we sever, MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)."[38] But context is important. The Court made this statement *immediately preceding* the sentences "When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." These sentences thus expand upon and explain the immediately preceding general statement. Again, if they did not mean what they say, why would they be in the opinion? And why would the other limiting language

[38] *Id.*

discussed previously be included? The People are not asking the Court to overrule the remedy stated in *Lockridge*, but instead to insure that lower courts apply it, so that only "When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." But when this is *not* the case—where the guidelines range is not increased by scoring of an OV or OVs by judicial fact-finding—the predicate for the severance remedy specifically delineated by this Court is absent, and MCL 769.34 remains fully applicable. The intent of the legislature to limit sentence disparity is best, though not fully, served in this manner, and in all events a contrary intent not having been made manifest by the legislature, MCL 8.5 requires that MCL 769.34 continue to be applied where it is constitutional to do so. Stare decisis is not implicated, no overruling being requested. At most, the Court might clarify that it meant what it said when it limited the severance remedy "to the extent" that it applies where the guidelines range is increased by judicial fact-finding.

Had this Court considered MCL 8.5 in *Lockridge* and determined that its holding applies even to constitutional applications of MCL 769.34, *then* the People's argument would be a request for an overruling. But because this Court has not considered the effect of MCL 8.5 on its holding that MCL 769.34 is unconstitutional as to some—but not all—applications of MCL 769.34(2) and (3), the request here is for this Court to consider that question for *the first time*. Stare decisis is thus not involved, as the issue here was 1) either already decided in favor of

limited severance, as the People argue, though without reference by the Court to MCL 8.5; that is, the remedy was limited to those situations where a guidelines range is increased by judicial fact-finding, and so is unconstitutional (again, the Court severed MCL 769.34(2) and (3) "to the extent that . . . .), or 2) the application of MCL 8.5 remains to *be* decided, as this Court has never considered it, and is presented in this case.[39]

[39] And "A point . . . assumed without consideration is, of course, not decided." *Allen v. Duffie*, 43 Mich. 1, 11 (1880). Here, the point—the application of MCL 8.5—was not even assumed, but not considered at all. Further, in *Lockridge* defendant's minimum range was increased by judicial fact-finding. Any application, then—which again the People argue did not occur in the opinion—of a "remedy" in circumstances where computation of the guidelines works no constitutional wrong would necessarily have been dicta. See e.g. *People v. Slaughter*, 489 Mich. 302, 329 (2011) ("The dissent criticizes this opinion for 'fail[ing] to explain which community-caretaking functions, beyond responding to an emergency or administering emergency aid, would reasonably justify a warrantless entry into a home.'. . . However, any such articulation would be dicta, because it would incorporate circumstances not controlling in the instant case"); *People v. Borchard-Ruhland*, 460 Mich. 278, 286 (1999) ("It is a well-settled rule that obiter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis").

II.

(Both Masroor and Steanhouse)

No remand should occur in this case, as 1) the *Alleyne/Lockridge* issue was not properly preserved, and under *People v. Lockridge* the sentences imposed here were not, as a matter of law, plain error, the trial judge having sentenced the defendants in excess of the top of the guidelines range, for valid reasons, which should end review of the sentence; further, 2) even the issue is viewed as properly preserved, review of departures from the guidelines range is for reasonableness, which is for an abuse of discretion and is not the same thing as review for proportionality under *Milbourn*, and a pre-*Lockridge* sentence that exceeds the guidelines and meets the more exacting standard of substantial and compelling reasons necessarily satisfies the abuse of discretion/reasonableness standard.

Standard of Review

A. *Masroor*

If the Court views the mandatory application of the guidelines to be severed even when the statutory scheme may constitutionally be applied, then questions regarding the proper application of *Lockridge* arise. The Court of Appeals in *Masroor* viewed the issue as preserved, saying that "Trial counsel objected to the scoring of defendant's guideline sentence pursuant to *Alleyne v. United States*."[40] But this is altogether too generous. Defense counsel stated only that he wished to make "a general objection to all of the OVs" under *Alleyne* for purposes of preservation,[41] and this is not sufficient to preserve a claim that any particular OV was scored by

[40] *People v. Masroor*, slip opinion, p.6.

[41] ST, 82A.

way of judicial fact-finding.[42] And the Court of Appeals statement that defendant objected under *Alleyne* at trial, and that "Appellate counsel raises the same argument,"[43] is simply inaccurate. *No* such issue was raised in defendant's brief.

B. *Steanhouse*

"[D]efendant did not object to the scoring of the OVs at sentencing on *Apprendi/Alleyne* grounds," said the Court of Appeals in *Steanhouse*, and it reviewed the sentence under *Lockridge* for plain error.[44] But though saying the sentence was to be reviewed for plain error, the court also said that "under *Lockridge*, this Court must review defendant's sentence for reasonableness,"[45] which would be the standard for preserved error, and, the People argue, is inconsistent with this Court's opinion in *Lockridge*

The People will thus first address the issue under the standard of plain error, and then under that for preserved error. Further, the construction of the reasonableness review standard is a question of law, reviewed *de novo*.[46] Because *People v Steanhouse* requires, contrary to this Court's opinion in *People v. Lockridge*, a remand even where plain error does not exist, the People begin there.

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[42] Cf. *People v. Bashans*, 80 Mich. App. 702, 705 (1978).

[43] *People v. Masroor*, p. 6.

[44] *People v. Steanhouse*, p. 21,

[45] *Id.*

[46] *People v. Carpentier*, 446 Mich. 19 (1994).

Discussion

A. Both the holding and rationale of *People v. Steanhouse*[47] are flatly inconsistent with *Lockridge*,[48] as this Court directed in *Lockridge* that as to sentences before that opinion where the *Alleyne*[49] issue was not preserved, "as a matter of law, a defendant receiving a sentence that is an upward departure *cannot show prejudice* and therefore cannot establish plain error"[50]

1. Under *Lockridge*, a sentence that is a justifiable departure from the minimum range cannot be plain error

In *Steanhouse*, defendant's guidelines range was 171-285 months, and the trial judge sentenced him to 360-720 months, a departure, then, of 75 months from the top of the range. There was no claim at sentencing that the guidelines were scored with judicially found facts as to some of the offense variables. Review was thus for plain error, as the court recognized,[51] though it failed to apply that standard as directed in *Lockridge*.

The sentence in *Steanhouse* was a departure from the guidelines range. The sentence in *Lockridge* was a departure from the guidelines range. The *Alleyne* issue was unpreserved in *Steanhouse*. The *Alleyne* issue was unpreserved in *Lockridge*. Lockridge received no relief, this

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[47] *People v. Steanhouse*, 313 Mich. App. 1 (2015).

[48] *People v. Lockridge*. 498 Mich. 358 (2015).

[49] *Alleyne v. United States*, 570 U.S. —, 133 S Ct 2151, 186 L. Ed.2d 314 (2013).

[50] *People v. Lockridge*, 498 Mich. at 395 (emphasis supplied).

[51] "[D]efendant raises an *Apprendi/Alleyne* challenge, arguing that his Sixth and Fourteenth Amendment rights were violated because the trial court's scoring of OV 3, OV 4, OV 5, and OV 6 was based on impermissible judicial fact-finding, which increased the floor of the minimum range recommended by the sentencing guidelines. Because 'defendant did not object to the scoring of the OVs at sentencing on *Apprendi/Alleyne* grounds, ... our review is for plain error affecting substantial rights.' *Lockridge,* –*–*–* Mich. at –*–*–*–*; slip op at 30." *People v. Steanhouse*, slip opinion, p. 21.

Court finding no plain error because of the departure,[52] holding that "[i]f a defendant makes that threshold showing [that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range] *and was not sentenced to an upward departure sentence*, he or she is entitled to a remand."[53] Yet Steanhouse received what is known now as a "*Crosby* remand": "Defendant may elect to forego resentencing by providing the trial court with prompt notice of his intention to do so. If 'notification is not received in a timely manner,' the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*."[54] And *Masroor* has been remanded as well, despite a guidelines departure that the Court of Appeals has found justified.[55] Something is plainly wrong with this picture.

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[52] "Assuming arguendo that the facts necessary to score OV 5 at 15 points and OV 9 and OV 10 at 10 points each were not established by the jury's verdict or admitted by the defendant, and yet those facts were used to increase the defendant's mandatory minimum sentence, violating the Sixth Amendment, the defendant nevertheless is not entitled to resentencing. Because he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), *the defendant cannot show prejudice* from any error in scoring the OVs in violation of *Alleyne*." *People v. Lockridge*, 498 Mich. at 393-394 (emphasis added).

[53] *People v. Lockridge*, 498 Mich. at 399 (emphasis supplied).

[54] *Steanhouse*, slip opinion, p. 25.

[55] *People v. Masroor*, slip opinon, p. 24 ("We affirm defendant's convictions but remand for further sentencing proceedings as we are bound to do so by *Steanhouse*").

The flaw is that the *Steanhouse* panel—as cogently demonstrated by Judge O'Connell in his dissent in *People v. Shank*[56]—failed to follow this Court's binding precedent when it remanded. As Judge O'Connell said in *Shank*, "[t]he answer to this question [whether Shank was entitled to resentencing] hinges on whether Shank, who failed to preserve an *Alleyne* claim below, has shown plain error. I conclude that *Lockridge* addresses the question in this case perfectly and answers it in the negative. Shank is not entitled to resentencing."[57] So here. Judge O'Connell viewed the error in *Steanhouse* as so clear he did not see the need for a conflict panel, saying the court

> need not convene a conflict panel to follow a rule articulated by the Supreme Court, even if a decision of this Court conflicts with the Supreme Court's decision. . . . Until the Supreme Court's decision is overruled by the Supreme Court itself, the rules of stare decisis require this Court to follow its decision. . . . Under the rule of stare decisis, this Court must follow a decision of the Supreme Court even if another panel of this Court decided the same issue in a contrary fashion. . . . Because *Steanhouse* ignored the clear directives of the Michigan Supreme Court, it is against the rules of stare decisis to follow the procedures in that case. I cannot in good conscience violate the rules articulated in *Lockridge.*
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> A remand under *United States v. Crosby,* 397 F 3d 103 (CA 2, 2005), is necessary to determine whether prejudice resulted from an error. *People v. Stokes,* –*–*–* Mich.App –*–*–*–*; –*–*–* NW2d –*–*–*–*; (2015) slip op at 11. The *Lockridge* court stated that no prejudice could result from the type of "error" involved in this case.[58]

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[56] *People v. Shank*, No. 321534, 2015 WL 7262670 (2015).

[57] *People v. Shank*, No. 321534, 2015 WL 7262670 (O'Connell, J., dissenting).

[58] *People v. Shank*, No. 321534, 2015 WL 7262670.

Judge O'Connell is quite correct, and the *Steanhouse* error is curious. The panel itself said that review was for plain error, and that under *Lockridge* defendant *could not show plain error.*[59] That should have brought the matter to conclusion—*as it was in Lockridge*—defendant not having, as the court said, shown plain error. If a claimed error is reviewed for plain error because not preserved, and plain error is not found, there is no further analysis to undertake. But the panel continued on to then treat the matter as though the error were preserved, saying "However, under *Lockridge*, this Court must review defendant's sentence for reasonableness,"[60] saying in an accompanying footnote that "Because a trial court is no longer required to provide a substantial and compelling reason for a departure from the sentencing guidelines under *Lockridge*, we need not review defendant's argument specifically concerning whether the reasons articulated by the trial court were substantial and compelling."[61] But this is *not* what this Court did in *Lockridge* when considering plain error and a departure from the guidelines. The Court in fact considered the reasons for the departure, saying "we agree with the Court of Appeals that the reasons

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[59] "The trial court departed from the minimum range recommended by the sentencing guidelines. Therefore, even if we assume that the facts necessary to score OV 3, OV 4, OV 5, and OV 6 were not established by the jury's verdict or admitted by defendant, defendant cannot establish plain error. . . . defendant received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for departing from that range), ... defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne.* [*Id.* at –*–*–*–*; slip op at 31.]" *People v. Steanhouse*, slip opinion, p. 21. The statement that the guidelines were "improperly scored" if some OVs were scored with judicial fact-finding is incorrect. The guidelines become advisory under *Lockridge*, but judicial fact-finding of OVs continues. The error *Lockridge* identified was mandatory ranges employing judicially found facts, not judicial fact-finding.

[60] *People v. Steanhouse*, slip opinion, p. 21.

[61] *People v. Steanhouse*, slip opinion, p. 21, accompanying footnote 14.

articulated by the trial court adequately justified the minimal (10–month) departure above the top of the guidelines minimum sentence range."[62] In *Lockridge*, then, because the sentence was a departure, plain error was not shown, and the inquiry *was at an end.* That is precisely the situation in *Steanhouse*, and the panel should have left the question of how the reasonableness inquiry is to be undertaken to another case with the issue properly preserved. The panel failed, as cogently laid out by Judge O'Connell in *Shank*, to follow *Lockridge*. In addition to this Court's statement that a predicate for plain error is that the sentence must not have been "subject to an upward departure," this Court also said, perhaps even more plainly, that:

- In cases such as this one that involve a minimum sentence that is an upward departure, a defendant *necessarily cannot show plain error* because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record.

- It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory. Thus, *we conclude that as a matter of law, a defendant receiving a sentence that is an upward departure cannot show prejudice and therefore cannot establish plain error*.[63]

After all, a departure that is justified by the stringent measure of substantial and compelling reasons is reasonable.[64]

In *Masroor* the top end of the guidelines range was 15 years (180 months). The trial judge sentenced to a minimum of 35 years (420 months), saying the case "cried out" for a

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[62] *People v. Lockridge*, 498 Mich. at 456 (footnote 2).

[63] *People v. Lockridge*, 498 Mich. at 395.

[64] On the other hand, however, in order to be reasonable, a departure after *Lockridge* need not be justified by substantial and compelling reasons. See infra.

departure.[65] While, the judge said, every sexual assault on a child under 13 is horrible, the present case was "uniquely vile and horrible for many reasons," including that there were three victims, not one, who were family members, and who trusted the defendant.[66] MCL § 769.34(3)(b) provides that departures from the guidelines cannot be based "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless* the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given *inadequate* or disproportionate weight" (emphasis supplied). The trial judge said that "there are any number of these guidelines variables that could be said to have been inadequately counted or insufficiently counted in this case,"[67] and began with PRV 7.

As the trial judge noted, "there's a maximum of 20 point awarded for contemporaneous criminal acts."[68] The court viewed that scoring as inadequate given the number of contemporaneous convictions here, and said "if we were to give the defendant ten points for each of the contemporaneous criminal acts that he committed, and this is objective and verifiable . . . . on the basis of the verdict alone we can easily score 140" points.[69] But, said the judge, "there are other OVs." 10 points are scored for a psychological injury; there were three victims, and so defendant could be given "30 points if we were using OV 4 as a springboard for a *proportionality*

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[65] ST, 119A.

[66] ST, 120A.

[67] ST, 122A.

[68] ST, 122A.

[69] ST, 123A.

description of a departure reason. And that's objective and verifiable. There were three victims."[70] Further, with regard to OV 13, concerning scoring for "three or more sexual penetrations against a person," the trial judge said that "consistent with the jury's verdict . . . . there were vastly more those acts that they [the jury] found. And that's objective and verifiable."[71]

Moving to whether a departure was justified, the trial judge said "And is it compelling and substantial? Well, I don't know how it isn't in this case,"[72] describing the case as "one of the most horrific and horrible sexual abuse crimes I've seen on so many levels."[73] Determining a proportionate departure, the trial judge looked to those objective and verifiable factors he had identified by way of finding that certain statutory factors had been given inadequate weight, as MCL § 769.34(3)(b) authorizes, and added points to those variables to reach a guidelines range to guide the departure, that range being 250-450 months. The judge found that a sentence of 35 years, which was within that range, was the appropriate sentence, noting that the "guidelines for a variety of reasons that I've already said don't even begin to adequately address the heinous nature of the crimes the defendant was convicted of."[74]

And so the trial judge identified objective and verifiable factors, going directly to the guidelines to find, as the statute permits, that certain guidelines variables were inadequately

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[70] ST, 124A.

[71] ST, 124A.

[72] ST, 124A.

[73] ST, 125A, the court describing the relationship between the defendant and the victims.

[74] ST, 125A-126A.

scored. The judge cabined his departure by using these guidelines factors as re-scored to take account of the objective and verifiable factors he had identified, and gave a sentence within that range. This complies with *People v. Smith*[75] by explaining the degree of departure reached, and cannot be said to be an abuse of discretion. The Court of Appeals found that

> *the trial court's explanation for defendant's departure sentence is more than adequate*. The court considered the sentence called for under the guidelines, and explained in considerable detail why a harsher sentence was needed for someone who had committed the number of serious sex crimes as had defendant. The court highlighted the highly unusual circumstances presented in this case, particularly that defendant had abused three sisters, threatened all of them in different and terrifying ways, and used the complainants' deeply-held religious beliefs to both conceal and further his illicit behavior.
>
> The trial court's observation that this was not an ordinary criminal sexual conduct case is well-supported by the record, as is the continuing emotional toll of defendant's misconduct endured by the three complainants. The guidelines do not take into account the seriousness of a longstanding pattern of sex crimes committed against three minors living together in the same home, or a defendant who uses his position as a religious and cultural leader and simultaneously as an instructor in the complainants' family to perpetrate his abuse. The record is rife with evidence that defendant's sexual abuse of all three complainants devastated their teenage years, and triggered tragic emotional repercussions that have continued into their adulthood. It is obvious to us that in selecting its sentence, the trial court was motivated by the need to impose a sentence that truly fit defendant's crimes, rather than to sensationalize the surrounding circumstances or to appease community sentiments. Taking into account the totality of the circumstances, defendant's sentence is reasonable.[76]

Defendant in neither *Steanhouse* nor *Masroor* can show plain error.

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[75] *People v. Smith*, 482 Mich. 292 (2008).

[76] *People v. Masroor*, slip opinion, p. 20-21 (emphasis supplied).

2. (*Masroor*) Where the *Lockridge* error is preserved, it is harmless beyond a reasonable doubt where either 1)there is a departure, and the record indicates nothing to suggest the defendant would have received a more lenient sentence had the trial judge sentenced under advisory guidelines; or 2)no reasonable jury could on the evidence fail to find that which the judge found through judicial fact-finding

If preserved constitutional error is somehow found in *Masroor*, it would, given the justified departure upward from the guidelines range, be harmless beyond a reasonable doubt. Federal cases have found *Booker* error harmless beyond a reasonable doubt in similar circumstances. See e.g. *United States v. Schafer*:[77] "After careful review of the sentencing record, we conclude that the *Booker* error was harmless beyond a reasonable doubt. The issue is whether Schafer would have received a more favorable sentence had the district court sentenced him under the advisory Guidelines regime mandated by *Booker*. In determining the 137–month sentence, the court first granted an upward departure to offense level 28 and criminal history category IV, based upon Schafer's extensive pattern of abusing children, the large number of visual depictions seized, and his understated criminal history. . . . This sentencing record contains nothing to suggest that Schafer would have received a more favorable sentence had the district court anticipated *Booker* 's advisory guidelines regime."

Further, an *Alleyne* error is harmless beyond a reasonable doubt when no reasonable jury could find, given the evidence, that the facts the judge found at sentencing that were not submitted to the jury for decision were not proven beyond a reasonable doubt.[78] On the facts

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[77] *United States v. Schafer*, 429 F.3d 789, 792-793 (CA 8, 2005). See also *United States v. Jones*, 435 F.3d 541 (CA 5, 2006).

[78] See e.g. *United States v. McIvery*, 806 F.3d 645, 651 (CA 1, 2015) (and again, the points for these OVs here did not increase the range).

here, see summary at *People v. Masroor*, slip opinion at 2, no reasonable jury could fail to find that the defendant engaged in predatory conduct, or that the children suffered psychological injury.

Finally, if this Court were to find the issue preserved, then the Court of Appeals erred in *Steanhouse* in adopting—re-adopting, as it were—the *Milbourn* proportionality standard. The panel in *Masroor* followed that holding only because required to, and, curiously, after having entered an order for a conflict-resolution panel, vacated that order as having been premised on a "clerical error."[79]

B. The *Booker*[80] remedy for the Sixth Amendment "problem": "in for a penny . . . ."[81]

To be clear at the outset, the People believe *Lockridge* was wrongly decided. That case treats the minimum term of the required indeterminate sentence as though it were the sentence itself—as in the federal system, where a determinate term is given—with the maximum term of the sentence meaningless in the inquiry. But the conviction itself authorizes service of the maximum of the indeterminate term, and release any time before service of the maximum is an executive determination by the Parole Board, not a judicial one, the minimum term being simply the first date at which the prisoner may receive parole consideration (and many serve past it). But be that as it may, this Court held otherwise, and has, to remedy the Sixth Amendment violation it perceives exists to "the extent to which the guidelines *require* judicial fact-finding

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[79] See orders of December 17, 2015, and December 18, 2015, the latter vacating the former, "a clerical error having been made in the polling." A miscount, perhaps?

[80] *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed.2d 621 (2005).

[81] See e.g. Charles Dickens, *The Old Curiosity Shop*: "Now, gentlemen, I am not a man who does things by halves. Being in for a penny, I am ready as the saying is to be in for a pound."

beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily increase the floor of the guidelines minimum sentence range*, i.e. the 'mandatory minimum,'" adopted the remedy employed by the United States Supreme Court to cure the Sixth Amendment deficiency that Court found with the federal guidelines system: *"Consistently with the remedy imposed by the United States Supreme Court* in *United States v. Booker* . . . we hold that a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only[82] and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness."[83] If the reasonableness review under *Lockridge* is intended to be consistent with that mandated by *Booker* in the federal system,[84] how is reasonableness ascertained there?

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[82] This presents yet another example of the limitation of this Court's severance remedy, as the Court here states that the guidelines are advisory only where "a guidelines minimum sentence range [is] calculated in violation of *Apprendi* and *Alleyne*."

[83] *People v. Lockridge*, 498 Mich. at 365 (emphasis supplied).

[84] See also *People v. Lockridge*, 498 Mich. at 392, citing *Booker*: "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. *Booker,* 543 U.S. at 261, 125 S.Ct. 738."

1. *Booker*, *Rita*,[85] *Gall*,[86] and *Kimbrough*[87]: reasonableness review is not proportionality review, but review for an abuse of discretion

a. *Booker*

After finding the federal guidelines violative of the Sixth Amendment because mandatory, the Court made them advisory, but maintained a standard of review. The Court severed 18 U.S.C. § 3553(b)(1), providing that the guidelines were mandatory, and also severed 18 U.S.C. § 3742(e), which provided standards of review on appeal, including *de novo* review of departures from the applicable guidelines range. This left, however, 18 U.S.C. § 3553(a), concerning factors to be considered by the sentencing judge:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

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[85] *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).

[86] *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007).

[87] *Kimbrough v. United States*, 552 U.S. 85 128 S.Ct. 558, 169 L. Ed.2d 481 (2007).

(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for--
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

From this statute, and the fact that until 2003 the statutory standard for reviewing departures had been reasonableness, the Court teased out a reasonableness standard of review for all sentences,

with the guidelines, and the factors listed in § 3553(a), to be considered, and guiding "appellate courts, as they have in the past, in determining whether a sentence is unreasonable."[88]

b. *Rita*

Another facet was added to federal reasonableness review here. After *Booker*, several circuits held that an appellate court may presume that a sentence *within* the guidelines range is reasonable. Rita argued at sentencing for a sentence below the guidelines range, and the trial judge said that he could not find that the range was inappropriate, and sentenced near the bottom of the range. The Fourth Circuit on review said that "a sentence imposed within the properly calculated Guidelines range. . . is presumptively reasonable," noting that while in an individual case a sentence outside the guidelines range might be appropriate, it had "'no reason to doubt that most sentences will continue to fall within the applicable guideline range,'" rejecting Rita's arguments that the sentence was unreasonable.[89]

The Court held use of this rebuttable presumption permissible, emphasizing that it is an appellate presumption, not a trial one—"Given our explanation in *Booker* that appellate 'reasonableness' review merely asks *whether the trial court abused its discretion*, the presumption applies only on appellate review." At sentencing itself,

> The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. . . .He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, . . . perhaps because the Guidelines sentence

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[88] *United States v. Booker*, 125 S. Ct. at 765-766.

[89] *Rita v. United States*, 127 S. Ct. at 2462.

> itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless . . . Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. . . . In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.[90]

c. Gall

In *Gall* the Court considered reasonableness review applied not to a sentence within the guidelines, as in *Rita*, but at variance with—a departure from—the guidelines range. The Government appealed a sentence substantially below the bottom of the range, and the Eighth Circuit applied proportionality review to the variance; that is, in that circuit's view, a "sentence outside of the Guidelines range must be supported by a justification that 'is proportional to the extent of the difference between the advisory range and the sentence imposed." Because the sentence imposed was a 100% downward variance, the court held that such a dramatic variance "must be—and here was not—supported by extraordinary circumstances."[91]

The Supreme Court rejected proportionality review of departures from the guidelines range, saying "we shall explain why the Court of Appeals' rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker* . . . ."[92]

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from

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[90] *Rita v. United States*, 127 S. Ct. at 2465 (emphasis supplied).

[91] *Gall v. United States*, 128 S. Ct. at 594.

[92] *Gall v. United States*, 128 S. Ct. at 594.

> the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.[93]

The Court held that the approach of the Eighth Circuit came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[94] The Court also disapproved of "*quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines. . . .*"[95]; further, these approaches, said the Court,"reflect a practice—common among courts that have adopted 'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing *decisions—whether inside or outside the Guidelines range*."[96]

In the end,

> [r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen

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[93] *Gall v. United States*, 128 S. Ct. at 594.

[94] *Gall v. United States*, 128 S. Ct. at 595.

[95] *Gall v. United States*, 128 S. Ct. at 595 (emphasis supplied).

[96] *Gall v. United States*, 128 S. Ct. at 596 (emphasis supplied).

> sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court *should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.* When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.[97]

The Court emphasized that the sentencing judge may not presume that the Guidelines range is reasonable, but must make an individualized assessment based on the facts presented. If the sentencing judge determines that a departure from the range is appropriate, the sentencing judge must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. The Court found it 'uncontroversial that a major departure should be supported by a more significant justification than a minor one."[98] But in all cases, review is for abuse of discretion.

d. *Kimbrough*

Here, the question was whether a sentence can be reasonable if the sentencing judge rejects a guidelines policy. Under federal statute, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine, and the Fourth

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[97] *Gall v. United States*, 128 S. Ct. at 597 (emphasis supplied)..

[98] *Gall v. United States*, 128 S. Ct. at 597.

Circuit held that a departure from the guidelines was unreasonable when based on a disagreement with scoring in this fashion. The Supreme Court disagreed. The Court upheld the departure as reasonable, noting that even the Government agreed that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,"[99] finding no reason to reach a different result in the circumstances of crack cocaine versus powder cocaine.

2. Federal circuit court applications of *Booker* reasonableness review: a sentence is affirmed unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the sentencing court provided

The Supreme Court has said that reasonableness review in the federal system is review for abuse of the sentencing court's discretion, whether the sentence imposed is inside or outside of the guidelines range. The reviewing court may presume that a guidelines sentence is reasonable, but that is an appellate presumption, and not one to be indulged by the trial court. Neither a proportionality review, nor a requirement of compelling circumstances, is appropriate for review of departures from the guidelines range, although a more significant explanation of reasons for the sentence is expected the greater the departure. Review remains, however, for abuse of discretion.

Federal courts have recognized that proportionality review is not appropriate.[100] Review is for abuse of discretion, a familiar concept to the federal courts, as well as to Michigan courts.

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[99] *Kimbrough v. United States*, 128 S. Ct. at 570.

[100] See e.g. *United States v. Richert*, 662 F.3d 1037 (CA 8, 2011); *United States v. Irey*, 612 F.3d 1160 (CA 11, 2010); *United States v. Guest*, 564 F.3d 777, 779 (CA 6, 2009) ("See *Gall*, . . . rejecting proportionality as an aspect of appellate review"); *United States v. Tomko*, 562 F.3d 558, 590 (CA 3, 2009) ("*Gall* . . . invalidated the 'proportionality principle'").

"'[A]n abuse of discretion occurs only when no reasonable person could take the view adopted by the trial court.'"[101] And so in the sentencing context, when a sentence under the federal guidelines, whether inside or outside the guidelines range, is reviewed, review is "highly deferential,"[102] and the sentence must be affirmed "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided."[103]

3. The *Masroor* panel was correct in the approach it would have taken but for *Steanhouse*

The People will not reiterate the majority's analysis in depth here, but the approach the panel majority *would* have taken but for *Steanhouse* is consistent with the federal approach discussed above,[104] and rightly rejects proportionality review,[105] as has the United States Supreme

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[101] *United States v. Torres*, __F.3d__ , 2015 WL 7770068, at 2 (CA 7, 2015). And see *United States v. Green,* 617 F.3d 233, 239 (CA 3, 2010) (An abuse of discretion occurs only where the decision is "arbitrary, fanciful, or clearly unreasonable—in short, where no reasonable person would adopt the district court's view"). It is often said in Michigan that an abuse of discretion occurs when the result is outside the "principled range of outcomes." See e.g. *People v. Blackston,* 481 Mich. 451, 460 (2008).

[102] *United States v Bungar*, 478 F.3d 540, 543 (CA 3, 2007).

[103] *United States v. Tomko*, 562 F.3d 558, 568 (CA 3, 2009) (en banc).

[104] The *Masroor* panel would have taken the following approach but for *Steanhouse*:

> (1) the guidelines themselves supply the starting point or initial benchmark of the analysis; (2) extraordinary or exceptional circumstances are not required to justify a sentence outside of the guidelines; (3) no presumption of unreasonableness attends a departure sentence; (4) a rigid mathematical formula is not to be applied; (5) the sentencing court must engage in an individualized assessment on the basis of the facts presented, taking into consideration mitigating or aggravating factors and the totality of the circumstances; (6) the extent of a departure must be considered and sufficiently justified, with a major departure supported by a more

Court in *Gass*, as discussed above. This Court having embraced the federal approach in *Lockridge*, it should follow that approach to its logical conclusion; that is, review for sentence departures being, as this Court has held, for reasonableness, a sentence departure is to be upheld unless it constitutes an abuse of discretion in that no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the sentencing court provided.[106] That cannot be said in either of these cases.

> significant justification than a minor departure; (7) substantive findings regarding reformation or rehabilitation, society's protection, punishment, and deterrence can potentially support a departure; and (8) if sufficient and sound justification is presented, a court may depart from the guidelines on the basis of a disagreement with the guidelines, or by finding that a guidelines variable is given inadequate or disproportionate weight. Ultimately, the touchstone of the departure analysis is reasonableness. *Masroor*, slip opinion, p. 19.

[105] *People v. Masroor*, slip opinion, p. 19-21.

[106] While *Gall* rejects proportionality review, it is only logical that a sentencing court "must give serious consideration to the extent of any departure from the Guidelines and must explain [its] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita,* the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions. . . . In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. . . . The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall v. United States*, 128 S. Ct. at 594-595, 597.

Relief

Wherefore, the People respectfully request that the sentences here be affirmed.

Respectfully submitted,

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